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No. 86-1528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARSH INVESTMENT CORP.,
Appellant,
v.
CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court, State of Colorado

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

A. Whether a case challenging the constitutionality of a municipal land use ordinance is "ripe" for review when the party challenging the ordinance has not utilized available municipal procedures to obtain a permit or seek a variance from the ordinance.

B. Whether, on a facial challenge, a party whose property is valued at a minimum of $6 million and whose present use of the property is unimpaired after an ordinance is enacted can assert that the ordinance effects a "taking" of its property.

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On Appeal from the Supreme Court, State of Colorado

MOTION TO DISMISS OR AFFIRM

Appellees, the City and County of Denver, the Mayor, City Council and its members, Building Department and Acting Director of the Building Department of the City and County of Denver, the Southmoor Park East Homeowners' Association ("SPEHA") and Thomas P. McCallin, respectfully request this Honorable Court to dismiss this appeal for lack of jurisdiction on the grounds that the controversy is not ripe for resolution in this Court, because the appeal does not present a substantial federal question, or the federal questions presented are so unsubstantial as to require no further argument, or in the alternative, to affirm the decision of the Colorado Supreme Court.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

A. Statement of the Facts

This case challenges the constitutionality of a Denver Municipal Ordinance enacted to preserve the mountain views from various Denver parks by limiting the height of numerous residential and commercial buildings within the view-plane of the parks to a level that does not block the view. Appellant Harsh Investment Corp., which at no time material to this action has had any plans to develop its property, seeks to have this Court rule that Denver is precluded from enacting an ordinance designed to preserve the natural beauty of the environment of its citizens, because the ordinance reduces its profit expectation.

Throughout this century, Denver has recognized the importance of mountains to its heritage. Like landmarks in other cities, the mountains in Colorado enhance the quality of life for all, represent the lessons of the past, and embody precious features of our heritage. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 108 (1978). With Denver's rapid growth in the late 1960s, the City Council enacted Section 10-56 (the "Mountain View Ordinance") of the Denver Municipal Code (hereinafter cited as "Code") to save Denver's mountain views. The stated purposes of the Mountain View Ordinance are to perpetuate the prosperity, civic pride, and general welfare of the people; to perpetuate the enjoyment and environmental enrichment of Denver's community and of visitors to Denver; to strengthen Denver's heritage as a city of the plains at the foot of the Rocky Mountains; to foster civic pride in Denver's beauty; to stabilize and enhance the aesthetic and economic vitality of the area whose views are preserved; to protect and enhance the city's attraction to tourists; and to promote good urban design (Code § 10-56). The original Mountain View Ordinance protected the views from

five parks: Cranmer Park (Code § 10-58), Cheesman Park (Code § 10-59), Ruby Hill Park (Code § 10-60), the State Capitol (Code § 10-61), and City Park (Code § 10-62). Later amendments added State Home Park (Code § 10-60.5), Washington Park (Code § 10-61.5), and Southmoor Park (Code § 10-62.5).

The City Council voted to include Southmoor Park within the purview of the Mountain View Ordinance when it enacted Section 10-62.5 (the "Southmoor Park Amendment") in July 1982. Appellant in this case, Harsh Investment Corp., owns commercially zoned property in a small portion of the area affected by the Southmoor Park Amendment (Tr. at 337, 340). The property in question is currently occupied by a Howard Johnson Restaurant and Motor Lodge under a long-term lease with Harsh (Tr. at 173). The Southmoor Park Amendment permits Harsh to build up to a height of 42 feet on its property (Code § 10-62.5), which is consistent with surrounding commercial development (Tr. at 163). Harsh has never applied for a building permit on its property (Tr. at 194), and admitted at trial that it had no development plans for the property (Tr. at 190). The Southmoor Park Amendment has no impact on Harsh's current use of its property, and the present value of Harsh's property, with the amendment in place, is at least $6 million (Tr. at 185).[1]

Southmoor Park is the only park in southeast Denver protected by the Mountain View Ordinance (Tr. at 150).

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[1] Harsh's Jurisdictional Statement (hereinafter cited as J.S.) asserts that Harsh established the loss in investment expectation value to its property by "expert calculations." (J.S. at 9). This is an apparent reference to "damage" testimony presented by Harsh at trial. Of the three plaintiffs, only Harsh presented such testimony. Bennett Wright, Vice-President of Harsh, testified as to his estimate of the value of Harsh's property. Mr. Wright was never qualified as an expert, his testimony was plainly self-serving, and no independent testimony or valuation was offered at any time as to the value of Harsh's property.

It is a multi-use park containing two baseball fields, football fields, picnic tables, and a playground (Plaintiff's Exhibits II and JJ, p. 6).[2] It is used frequently for events such as athletics, Denver school outings, picnics, and band concerts (Tr. at 151, McCallin Depo. at 22-23).[3]

The trial judge, after observing the mountain views from each of the protected parks, stated that:

> As far as Southmoor Park is concerned . . . there is, I determine, a panoramic mountain view. . . . [Y]ou can see all the way to Long's Peak and a long way south. The trees off to the south block Pike's Peak from the view, but there is a view of a lot of the mountains from that elevation of the park.

Tr at 346. Similarly, the developers' own witnesses conceded at trial that Southmoor Park offers a clear view of the front range (Tr. at 65, 105, 235, 269). On a clear day an observer can see the Devil's Head formation, Lookout Mountain (the burial site of Buffalo Bill), the Mother Cabrini Shrine, and Red Rocks Park (McCallin Depo., p. 12).

From the first stages of its development in the mid-1960s, the Southmoor Park neighborhood was promoted and marketed for the magnificent mountain views it offers. (Exhibits 00, 26, 27). When local residents became aware of Landmark Land Company's ("Land-

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[2] Harsh claims that before the Southmoor Park Amendment, all protected views were from areas with "significant regional and scenic importance," and that Southmoor Park has no such importance. J.S. at 5 n.7. This argument is not supported by the record. Indeed, the record reveals that the city classifies two of those parks, Cheesman Park and Cranmer Park "neighborhood parks," the same classification given Southmoor Park, and Ruby Hill Park as a "community park." Plaintiffs Exhibit JJ.

[3] By stipulation of the parties at trial, the parties designated deposition testimony rather than calling certain witnesses. The cited deposition testimony is, therefore, part of the record.

mark") plan to build either one or two high rises which would obstruct the view of the mountains, they proposed the Southmoor Park Amendment.[4] The record reflects that the citizens immediately became concerned with the threatened destruction of their views (Tr. at 34, 35, Bradley Depo. p. 70, Plaintiff's Exhibits G, H). Support for the amendment was not limited to a small, localized group; community groups throughout metropolitan Denver voiced their support of the amendment, and appeared before the Denver City Council to urge its passage (Tr. at 67; McCallin Depo. p. 78; Reynolds Depo. p. 27, 29; Defendant's Exhibit 20 p. 4; Cert. Record of City Council Proceedings, Letter from Pine Valley Homeowners).

Harsh and other developers[5] joined with other powerful members of Denver's business community to launch a vigorous campaign in opposition to the Southmoor Park Amendment, lobbying the Denver Planning Board, the City Council and the Mayor's office in an effort to prevent the Southmoor Park Amendment from passing (Tr. at 68-70, 160, 192-94; Defendant's Exhibits 2-22). Although Harsh's Jurisdictional Statement contains a long passage about how the Homeowners' Association supposedly railroaded the Southmoor Park Amendment

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[4] The Jurisdictional Statement suggests that Harsh was the target of a rezoning effort by the homeowners. The only rezoning applications filed by SPEHA applied to the property of Landmark, who is not a party to this appeal. Furthermore, SPEHA's efforts to rezone Landmark's property are utterly irrelevant to this proceeding. Harsh does not contend here, as it did unsuccessfully in front of the Colorado Supreme Court, that zoning procedures should have been followed to enact the Southmoor Park Amendment. From a "taking" standpoint, it is immaterial whether a municipality's action is zoning or not.

[5] Two other developers, Landmark and Southmoor Park Shopping, Inc. ("Shopping"), joined in the campaign and later sued to challenge the ordinance. Their lawsuits were consolidated with Harsh's at trial and again on appeal to the Colorado Supreme Court. Landmark and Shopping have not joined in the appeal to this Court.

through the City Council, Harsh in no way challenges the procedures involved in the enactment of the amendment.[6]

The Southmoor Park Amendment was introduced before the Denver City Council on first reading on June 22, 1982. Although the procedural standards of the Mountain View Ordinance do not require that the Denver Planning Board meet to consider amendments to the ordinance, the Denver Planning Board held a public hearing on July 7, 1982, at the request of Landmark and recommended that the City Council reject the amendment (Defendant's Exhibit 4, Bradley Depo. p. 15). Harsh and the other developers were represented at that meeting, both individually and by counsel. Following a presentation by the developers, the Planning Board applied its criteria, which are "general guidelines rather than restrictive standards" (Plaintiff's Exhibit CC), and rec-

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[6] Harsh argues that the Southmoor Park Amendment is aimed specifically at its property. J.S. at 22. The trial court, however, expressly found that the amendment affects "several hundred properties" (Tr. at 340). Landmark, who is not a party to this appeal, was the only developer with any sort of development plan. Whether a view merits protection, the maximum height of buildings, and the amount of property to be restricted in order to preserve the view are matters of purely local concern. As this Court wrote in *Welch v. Swasey*, 214 U.S. 91 (1909):

> In passing upon questions of this character as to the validity and reasonableness of a discrimination or classification in relation to limitation as to height of buildings in a large city, the matter of locality assumes an important aspect. The particular circumstances prevailing at the place or in the state where the law is to become operative,—whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare—are all matters which the state court is familiar with; but a like familiarity cannot be ascribed to this court, . . ."

Id. at 105.

ommended that the City Council not pass the amendment (Tr. at 105, 128; Defendant's Exhibit 19).[7]

Although the City Charter does not require the City Council to hold public hearings for amendments to the Mountain View Ordinance, the City Council held a hearing on July 12. Before the hearing, Harsh, Landmark and Shopping met and/or corresponded with each member of the City Council and with the Mayor to voice their opposition to the amendment (Tr. at 68, 160, 192-93; Defendant's Exhiibt 3, 5-18). In addition, Harsh tried to enlist the help of prominent members of the local business community to defeat the amendment (Tr. at 193-94). Officials of the developers spoke against the amendment at the hearing, and the developers were represented by their attorneys and a private consultant (Cert. Record of City Council proceedings, Minutes of July 12th meeting). Many Council members visited the park before voting on the amendment (Scheitler Depo. p. 4; Reynolds Depo. p. 7; Sandos Depo. p. 9; Crider Depo. p. 12; Donahue Depo. p. 11), and the amendment passed by a 9-3 vote.

After the City Council passed the amendment, the developers unsuccessfully sought a mayoral veto. The record reveals that Harsh had full and complete access to the political process, including a planning board hearing, a full city council hearing, and extensive lobbying. Throughout the period before the Southmoor Park Amendment was enacted, while the amendment was pending before the City Council, and since the enactment of the Southmoor Park Amendment, Harsh has never submitted any development plans, applied for any building permits, or sought a variance from the height ordinance (Tr. at 190).

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[7] Harsh again exaggerates the record, claiming that the "Planning Office found that Southmoor Park failed to meet the established criteria it had applied to all previously protected areas." J.S. at 6. The record shows, however, that the criteria were established only as a reaction to the proposed Southmoor Park Amendment, Tr. at 120-22, and were not binding. Tr. at 128.

B. Proceedings Below

Following passage of the Southmoor Park Amendment, Harsh sued in the District Court for the City and County of Denver, asserting that the mere passage of the Ordinance constituted a *de facto* rezoning of its property, and that proper zoning procedures were not followed. Harsh asserted that the City Council used its legislative power to perform what should have been a judicial function, with the attendant notice, hearing and application of fact to existing legal criteria. Harsh's lawsuit was consolidated with those of Landmark and Shopping. SPEHA and Thomas P. McCallin, a Southmoor Park homeowner, intervened as defendants with the City and County and certain of its officials.

At trial, Harsh, Landmark, and Shopping received a full and complete hearing on the merits. Plaintiffs presented extensive testimony concerning the history and purposes of the Mountain View Ordinance and the Southmoor Park Amendment, and the alleged political maneuvering by the homeowners and the developers before the amendment was passed. At the request of all parties, the trial judge conducted a "view" of Southmoor Park and each of the seven other parks with protected mountain views. The trial judge found that under Colorado law zoning or rezoning procedures did not apply to the enactment or amendment of the Mountain View Ordinance, and that the City could, under its police power, properly enact or amend the ordinance in its legislative capacity. The trial judge found that there is a panoramic mountain view from Southmoor Park (Tr. at 346), and concluded that the purposes of the Mountain View Ordinance were fully met and satisfied by the Southmoor Park Amendment.

The judge noted that the value of Harsh's property was not an issue before the court (Tr. at 341), but found that although the property was worth less than before the amendment was enacted,

> [i]t is also clear that there was not a taking of the three plaintiffs' properties. These properties are still very valuable. As far as Harsh is concerned we have the testimony it's worth six million dollars after passage of the Mountain View Ordinance. . . . They still have very valuable property, and it will continue to be valuable in the future.

(Tr. at 341-42)

The consolidated cases were then appealed to the Colorado Supreme Court. The Colorado Supreme Court unanimously affirmed, holding that under state law, the Southmoor Park Amendment was legislative in nature, a proper exercise of the City's police power, and substantially related to a legitimate government concern. Finally, the Colorado Supreme Court held that because Harsh's present uses of its property could continue under the amendment, no property was unconstitutionally taken:

> Appellants cannot meet this test (i.e., unconstitutional taking) as their present use of their land may continue under the amendment. They attempt to find a constitutional taking by distinguishing the cases requiring deprivation of all beneficial use of property and arguing that those cases involved a landowner bringing suit to change the zoning ordinance as it existed when the land was purchased.
>
> Such a distinction is unpersuasive.

Landmark Land Co. v. City and County of Denver, 728 P.2d 1281, 1287 (Colo. 1986).[8]

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[8] Harsh presents this case as an opportunity for the Court to consider what it characterizes as Colorado's "rigid 'no value' test": whether Denver has taken all value from Harsh's property. J.S. at 13-15 & n.20. The quoted language of the Colorado Supreme Court opinion reveals that the court looked instead to Harsh's continuing unimpaired use of its property. Moreover, in footnote 20, Harsh cites two cases from other states which purportedly apply "no value" tests, both of which were appealed to this Court, which dismissed each appeal for want of a substantial federal

ARGUMENT

I. The Appeal Should Be Dismissed For Lack Of Jurisdiction Because Harsh's Taking Claim Is Not Ripe Until Harsh Is Refused A Building Permit, Applies For A Variance, And Exhausts All Available Administrative Remedies.

The constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary. *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 294-95 (1981). Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property. *Id.* An "essential prerequisite" to the assertion of a takings claim is a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2566 (1986). In *Hodel*, this Court concluded that "mere enactment" of legislation does not "affect a taking of private property." 452 U.S. at 297, n.40. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court held that until a developer submits a plan for development of its property, there is no "concrete controversy" regarding the application of specific zoning provisions. *Id.* at 260. Before a takings case is ripe for review in this Court, a landowner must exhaust his administrative remedies, including applying for a building permit and exhausting municipal variance procedures. The uncontroverted record establishes that Harsh has not done so, and this case is therefore not ripe for review.

In both *Hodel* and *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985),

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question. *Commonwealth v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378 (Ky. 1984), *appeal dismissed*, 105 S. Ct. 3549 (1985); *State v. Good Samaritan Hospital*, 299 Md. 310, 473 A.2d 892 (1983), *appeal dismissed*, 469 U.S. 802 (1984).

landowners challenged legislation on the ground that it constituted either a "taking" of private property without just compensation in violation of the Fifth Amendment, or a deprivation of property without due process in violation of the Fourteenth Amendment. In both cases, this Court held that the cases were not ripe because, as in the instant case, the landowners had not sought variances from the legislation in question. *Hodel*, 452 U.S. at 297; *Williamson County*, 473 U.S. at 186. Not only has Harsh failed to seek a variance but it has not even applied for a building permit and concedes that it has no immediate development plans (Tr. at 190).

Hodel involved a challenge to the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201, *et seq.* (1976 & Supp. III) which requires, *inter alia*, that coal miners restore land to its original condition after mining it, and prohibits mining in certain locations. 452 U.S. at 269. The district court found that it was "economically and physically impossible" to restore mines on steeply sloped property to their original condition. *Id.* at 293. This Court held that the taking issue was not ripe for judicial resolution because

> There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of § 515(d) or a waiver from the surface mining restrictions in § 522(e). If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions.

Id. at 297.

Similarly, in *Williamson County* a developer challenged a change in a zoning ordinance as a "taking" in violation

of the Fifth and Fourteenth Amendments. Following the zoning change, the developer submitted a revised preliminary plat to the regional planning commission. The commission rejected it, raising eight specific objections. Based on the objections, the developer claimed that the zoning change reduced the number of housing units he could build on his property from 736 to 67.[9] 473 U.S. at 182. Williamson County has a board of zoning appeals which has the power to grant variances which could have resolved at least five of the commission's eight objections. *Id.* at 3117-18. The developer, like Harsh, sued precipitously without seeking variances from either the commission or the board of zoning appeals. Because the developer did not seek the variances, this Court held that its claim was not ripe.

This case requires the same result as *Hodel* and *Williamson County*. Denver also has a variance procedure which Harsh did not even attempt to follow. In fact, Harsh has made no effort to develop its property, as did the developer in *Williamson County*. Harsh admitted at trial that it has no immediate plans to develop its property (Tr. at 190), and that, at the time of trial, the property was leased, including an option to renew, until 1991 to Howard Johnson for a 186-room motel with a restaurant, cocktail lounge, and gasoline service station (Tr. at 173, Exhibit 25). Article III of Chapter 41 of the Code establishes a Board of Plan Enforcement Review and Variation which has the power to grant variances from the Mountain View Ordinance and the Southmoor Park Amendment. Section 41-74 provides that the Board has the power:

> [t]o authorize, upon appeal in specific cases, such variations from the terms of Chapter 10, subject to the terms and conditions fixed by the Board, as will not be contrary to the public interest where, owing to

[9] Other testimony asserted that the developer could build as many as 300 units. 473 U.S. at 182 (1985).

> exceptional and extraordinary circumstances, literal enforcement of Chapter 10 would result in unnecessary hardship.

Code, Section 41-74, attached as Appendix A.[10] At this stage, Harsh is, as the Court wrote in *Agins*, "free to pursue (its) reasonable investment expectations by submitting a development plan to local officials," 447 U.S. at 262, applying for a building permit, and seeking a variance—all of which it must do before presenting this Court with a ripe, concrete controversy. As the Court wrote in *Williamson County*, "whether the property taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished, it is impossible to determine the extent of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations." 473 U.S. at 192 n.12.

II. The Southmoor Park Amendment Does Not Deny Harsh The Economically Viable Use Of Its Land.

In view of the foregoing, Harsh raises no substantial federal question, and presents no issues that have not been settled under well-established case law. Harsh's only challenge to the amendment is that it is facially invalid. *See Keystone Bituminous Coal Association v. DeBenedictus*, 107 S. Ct. 1232, 1247 (1987). As Harsh concedes, the test in a facial challenge is straightforward: "[a] statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.'" J.S. at 106 n.14 (quoting *Keystone*, 107 S. Ct. at 1247 and *Hodel*, 452 U.S. at 295-96). This test presents a challenger with an

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[10] Appellees wish to bring to the Court's attention, pursuant to F.R.E. 201(b) and (f), that the Denver Board of Plan Enforcement Review and Variation has granted variances from the Mountain View Ordinance to permit buildings which intrude in the view plane. *E.g.*, Terracentre Association (4/9/81); United Bank of Denver and Gerald Hines (jointly) (1/17/80).

"uphill battle" which is "made especially steep" where, as here, the petitioner has not claimed that its *existing use* of the property is commercially impracticable. *Keystone*, 107 S. Ct. at 1247. The record is undisputed that Harsh's existing property uses are unimpaired by the amendment (Tr. at 187), and that its property value with the Southmoor Park Amendment exceeds $6 million (Tr. at 185).

Harsh does not assert that the Mountain View Ordinance is an invalid exercise of the police power. Nor is it an unconstitutional taking. It is well settled that the fact that an ordinance deprives a property owner of its most beneficial use of its property does not render the ordinance unconstitutional. *E.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). An ordinance may deprive a landowner of as much as 92½ percent of his property value without constituting a taking. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The Court has sustained as a valid exercise of police power,[11] city ordinances restricting building height, *Welch v. Swasey*, 214 U.S. 91 (1909), establishing setbacks, *Gorieb v. Fox*, 274 U.S. 603 (1926),[12] and implementing other restric-

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[11] This Court has written that the values represented by police power are "spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26, 33 (1954). *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) ("The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.").

[12] *Gorieb* also relied on principles of comity and federalism to uphold the setback ordinance:

> State legislature and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their

tions which deprive a landowner of uses of air space above his property. *E.g., Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978).[13]

In *Penn Central*, this Court confirmed that states and cities may, as a legitimate exercise of their police power, restrict uses of land to preserve the character and aesthetics of a community. "Before considering these, we emphasize what is not in dispute . . . . this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city . . ." 438 U.S. at 129 (citations omitted). The Court in *Penn Central* upheld a landmark preservation law against landowners' contentions very similar to those made by Harsh in this case, i.e., that the law imposed disproportionate burdens on them, appropriated the airspace above their property,

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conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

274 U.S. at 608; *see also Welch v. Swasey*, 214 U.S. 91, 105-07 (1909). As Justice Marshall has written, the role of the Supreme Court is not to "sit as a zoning board of appeals." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

[13] States have long been mindful of the necessity of height restrictions in various settings. As early as 1885, an amendment to the New York tenement house laws restricted the height of all residential buildings to 80 feet on streets over 60 feet wide. New York Laws, Ch. 454 (1885). In Massachusetts, an 1895 statute permitted towns to limit the height of buildings near parks to 70 feet, with exceptions for steeples and domes. Mass. Gen. Laws, Ch. 13 (1896); Ch. 379 § 1 (1897). Contemporary examples of such regulations abound; cases in California, Connecticut, Hawaii, Illinois, Iowa, Florida, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Vermont, Virginia, Washington and Wisconsin have all upheld height restrictions. R. Anderson, *American Law of Zoning 3d* §§ 9.54, 9.55 (1986); A. Rathkopf and D. Rathkopf, *The Law of Zoning and Planning* § 34.05 (1987); N. Williams, *American Planning Law*, Ch. 67 (1985). *See also, Cochran v. Preston*, 108 Md. 220, 70 A. 113 (1908) (upholding height limitation in the area surrounding the Washington Monument).

and significantly diminished their property value. The Court rejected Penn Central's argument that it had been wholly deprived of a discrete segment of its property, the airspace above it:

> [T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of all rights, but also in approving those prohibiting both the subjacent and the lateral development of particular parcels. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.

Id. at 130 (citations omitted). Last term, the Court, upholding restrictions on the location of adult movie theatres, reaffirmed that "a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 930 (1986) (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80 (1974) (Powell, J., concurring)).

Under *Keystone*, Harsh raises a federal question only if it meets a simple, but strict test: whether the Mountain View Ordinance deprives Harsh of economically viable use of its land. Harsh ignores the *Keystone* test and asks the Court to look to the amendment's "interference" with Harsh's "investment-backed expectations." (J.S. at 10, 11).[14] Harsh, however, presented no testi-

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[14] Harsh asserts that Denver has "plucked strands" from Harsh's "bundle of rights" by depriving it of estimated future profits (J.S. at 10-11). As strands go, however, the loss of future profits is "a slim reed upon which to rest a takings claim." *Andrus v. Allard*, 441 U.S. 51 (1979). Harsh's present use of its property, which must be considered its primary expectation concerning the use of its property, *Penn Central*, 438 U.S. at 136, is unimpaired.

mony as to its investment-backed expectations. The only testimony it presented as to the value of its property consisted of the surmise and speculation of one of its corporate officers. Harsh offered no testimony as to its plans for the property beyond the terms of the Howard Johnson lease. With no development plans, its existing use of its property unimpaired and its property valued at six million dollars, Harsh cannot argue that it has been deprived of economically viable use of its land and thus fails to satisfy the threshold test of *Keystone*.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction because it is not ripe. The appeal also does not raise a substantial federal question. For the reasons stated above, this Court should dismiss this appeal or affirm the decision of the Colorado Supreme Court.

Dated this 20th day of May 1987.

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APPENDIX A

Sec. 41-74. Powers.

Subject to the limitations enumerated herein, the board of plan enforcement review and variation shall have and exercise the following powers in connection with chapter 10 but with no other portion, of this Code. In the exercise of its powers, the board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and, to that end, shall have all the powers of the officer or department from whom the appeal is taken.

(1) *Administrative review.* To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of chapter 10.

(2) *Variations.* To authorize, upon appeal in specific cases, such variations from the terms of chapter 10, subject to terms and conditions fixed by the board, as will not be contrary to the public interest where, owing to exceptional and extraordinary circumstances, literal enforcement of the provisions of chapter 10 would result in unnecessary hardship. Every variation authorized hereunder shall not be personal to the applicant therefor, but shall be transferable and shall run with the land. No variation shall be authorized hereunder unless the board shall find that all of the following conditions exist:

a. That the use proposed by the applicant is a permitted use in the zoning district applicable to the subject land;

b. That literal enforcement of chapter 10 would preclude a reasonable development of the land of the applicant for the use proposed;

c. That the development of the land proposed by the applicant would not be such as to defeat the purposes of chapter 10;

d. That the development proposed by applicant is the minimum development which would be needed to secure for applicant from the land a reasonable return in service, use or income;

e. That the development proposed by applicant would not result in damage to neighboring properties or public lands.

(3) *Oaths and attendance of witnesses.* For the purpose of exercising the powers enumerated in this section, the board shall elect a chairperson and vice-chairperson. The chairperson, or, in the chairperson's absence, the vice-chairperson, shall administer oaths to or accept affirmations from witnesses and may compel the attendance of witnesses. A failure or a refusal to appear in response to a subpoena issued by the board shall constitute a violation of this article.

(Code 1950, § 649.1-4)